Petition

Office - Supreme Court, U.S.
FILED
NOV 23 1981
ALEXANDER L. STEVAS,
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81-973

No.

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

JACK A. DAHLSTRUM

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the Double Jeopardy Clause precludes the retrial of a defendant who, although having ample opportunity to do so, fails to object to the court's mid-trial dismissal of the indictment for reasons unrelated to guilt or innocence.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional provision involved	2
Statement	2
Reasons for granting the petition	5
Conclusion	13
Appendix A	1a
Appendix B	11a

TABLE OF AUTHORITIES

Cases:

Arizona v. *Washington*, 434 U.S. 497 ..... 5, 6, 11
Illinois v. *Somerville*, 410 U.S. 458 ..... 6, 9
Lee v. *United States*, 432 U.S. 23 ..... 7, 11
Scott v. *United States*, 202 F.2d 354, cert. denied, 344 U.S. 879 12
United States v. *Beckerman*, 516 F.2d 905 12
United States v. *DiFrancesco*, 449 U.S. 117 6
United States v. *Dinitz*, 424 U.S. 600 ..... 5, 6, 7, 9
United States v. *Evers*, 569 F.2d 876 9
United States v. *Gentile*, 525 F.2d 252, cert. denied, 425 U.S. 903 12
United States v. *Gordy*, 526 F.2d 631 12
United States v. *Jorn*, 400 U.S. 470 ..... 5, 7, 8, 11
United States v. *LaSalle National Bank*, 437 U.S. 298 ..... 2, 3, 4, 8
United States v. *Morrison*, 449 U.S. 361 5
United States v. *Perez*, 22 U.S. (9 Wheat.) 579 6
United States v. *Phillips*, 431 F.2d 949 12
United States v. *Samango*, 607 F.2d 877 8

Cases—Continued Page

United States v. *Scott*, 437 U.S. 82 .....4, 5, 6, 7, 10, 11
United States v. *Sedgwick*, 345 A.2d 465, cert. denied, 425 U.S. 966 12
Wade v. *Hunter*, 336 U.S. 684 5

Constitution and statutes:

United States Constitution:
Fifth Amendment 2
Double Jeopardy Clause 5, 8, 9, 10, 11
26 U.S.C. 7203 2
26 U.S.C. 7602 2

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-10a) is reported at 655 F.2d 971. The opinion of the district court (App. B, *infra*, 11a-32a) is reported at 493 F. Supp. 966.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1981 (App. A, *infra*, 1a). On October 29, 1981, Justice Rehnquist extended the time

within which to file a petition for a writ of certiorari to and including November 23, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part:

> [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb * * *.

STATEMENT

Respondent was charged with failure to file personal income tax returns for the years 1973, 1974, and 1975, in violation of 26 U.S.C. 7203. He waived his right to a jury trial, and a bench trial commenced on April 14, 1980 (App. B, *infra*, 11a). During the presentation of the government's case-in-chief on the second day of trial, respondent's former attorney testified that IRS Special Agent Schreiber, who had issued a summons under 26 U.S.C. 7602 for production of some of respondent's partnership records, had declined to discuss a civil settlement with the attorney, stating that he was not interested in the civil aspects of the case. The district court then became concerned that the summons had been issued in an investigation that had solely criminal purposes, in violation of *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978) (App. A, *infra*, 2a; Tr. 191-195).[1] In order to dispel the court's concerns, the

[1] "Tr." refers to the transcript of the proceedings in the district court. "C.R." refers to the Clerk's Record in the district court.

government offered to call Agent Schreiber as a witness to explain the circumstances surrounding the issuance of the summons (Tr. 195). The court agreed that the agent should take the stand so that the court could "decide whether I should even go on any further with this case or throw it out on the grounds of IRS misconduct" (Tr. 196).

Both respondent's counsel (Tr. 200-206) and the court questioned Agent Schreiber about the summons (Tr. 196-242). In the course of the testimony, the court explained that the inquiry into the circumstances surrounding the issuance of the summons was necessary because "if the summons is issued for the purpose of an entirely criminal case, the only remedy is dismissal of the indictment" (Tr. 207). At the court's direction (see Tr. 221, 266), Agent Schreiber's group manager, Thomas Sullivan, was called to testify concerning aspects of the investigation of respondent and general IRS practices regarding the issuance of summonses. Again, both respondent's counsel (Tr. 282-288) and the court questioned Sullivan (Tr. 266-305). In addition, respondent's counsel successfully argued to the court that the IRS was not conducting a joint criminal and civil investigation at the time the summons was issued (Tr. 297-303). The district court concluded (Tr. 303-312) that the summons had violated the constraints of *LaSalle National Bank*, *supra*, and it orally ordered the indictment dismissed on grounds of "governmental impropriety" (Tr. 312).

The oral order of dismissal occurred on April 15, 1980; on June 6, 1980, respondent submitted proposed findings of fact, conclusions of law, and a proposed order calling for dismissal of the indictment (C.R. 20). On July 10, 1980, the government filed its objections (C.R. 19). On July 11, 1980, the district court filed its written decision, which set forth

its reasons for finding a violation of *LaSalle National Bank* and explained why it viewed dismissal as an appropriate remedy (App. B, *infra*, 11a-32a). The court also entered judgment stating that the indictment was dismissed with prejudice and respondent "acquitted" of the charges contained in the indictment (*id.* at 32a).

In considering its jurisdiction to entertain the government's appeal, the court of appeals first determined that it could not conclude that the district court's ruling constituted an unappealable acquittal, because it did not appear to represent a resolution of any of the factual elements of the offense charged (App. A, *infra*, 3a-7a); rather, the district court's decision clearly stated that it was based on "governmental misconduct" (*id.* at 6a). The court of appeals went on to hold, however, that a retrial of respondent would be barred by the Double Jeopardy Clause. While recognizing that *United States* v. *Scott*, 437 U.S. 82 (1978), permits a retrial after a mid-trial dismissal on grounds unrelated to guilt or innocence (App. A, *infra*, 7a), the court distinguished *Scott* on the ground that it involved "a high degree of participation" by the defendant in bringing about a termination of his trial (*id.* at 9a). Here, the court stated, "*the judge was the instigator and the primary mover of the events that led to the dismissal of the indictment*" (*id.* at 8a; emphasis in original). Thus, the court concluded, respondent "did not 'voluntarily choose' to avoid submitting the case to the trier of facts on the merits," and "his minimal participation did not fall within the rule stated in *Scott*" (*id.* at 9a).[2]

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[2] In light of this resolution, the court of appeals did not reach the issue whether the district court misapplied *LaSalle National Bank* (App. A, *infra*, 3a n.2), and that question

REASONS FOR GRANTING THE PETITION

1. This case presents an important and fundamental question concerning the scope of the Double Jeopardy Clause as it applies to appeals and retrials following an erroneous termination of a trial before a verdict is reached. This Court has previously considered other aspects of this general problem of the circumstances in which the protection of the defendant's "'valued right to have his trial completed by a particular tribunal'" (*United States* v. *Dinitz*, 424 U.S. 600, 606 (1976), quoting *Wade* v. *Hunter*, 336 U.S. 684, 689 (1949)) requires that the government be denied even one full opportunity to prove his guilt. See, *e.g.*, *United States* v. *Scott*, 437 U.S. 82 (1978); *United States* v. *Jorn*, 400 U.S. 470 (1971); *Wade* v. *Hunter*, *supra*. Here the court of appeals seriously departed from the principles enunciated in these and other cases in barring the retrial of a defendant whose first trial was terminated on grounds unrelated to his guilt or innocence.

It is well established that one component of the Double Jeopardy Clause protects a defendant's right to receive the verdict of the factfinder at the first trial. See, *e.g.*, *Arizona* v. *Washington*, 434 U.S. 497, 503 (1978). A deprivation of this right will, in some

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is not before this Court. It is the government's view that the district court committed egregious error in dismissing respondent's prosecution on account of supposed irregularities in the use of summonses by the IRS prior to institution of the prosecution. Not only was the court unjustified in finding the summons improper, but in any event dismissal of the indictment is an unprecedented and unwarranted sanction, particularly in the absence of any showing of prejudice (cf. *United States* v. *Morrison*, 449 U.S. 361 (1981)), or any effort by respondent to challenge the validity of the summons at the time it was issued.

circumstances, bar a retrial. See generally *United States* v. *DiFrancesco*, 449 U.S. 117, 131 (1980). When a mistrial is declared over the defendant's objection, he may not be retried unless the mistrial was occasioned by "manifest necessity." See, *e.g.*, *Arizona* v. *Washington*, *supra*, 434 U.S. at 505; *Illinois* v. *Somerville*, 410 U.S. 458 (1973); *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579, 581 (1824).[*] On the other hand, a retrial is generally permitted where a defendant successfully moves for a mistrial. See, *e.g.*, *United States* v. *Dinitz*, *supra*, 424 U.S. at 606-611. In *United States* v. *Scott*, *supra*, the Court held that a defendant could be retried after he successfully moved in the middle of the trial for dismissal of the indictment on grounds unrelated to guilt or innocence. The Court explained that "the Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice." 437 U.S. at 99. Thus, a defendant who chooses to have his trial terminated before the factfinder's determination of guilt or innocence "has not been 'deprived' of his valued right to go to the first jury; only the public has been deprived of its valued right to 'one complete opportunity to convict those who have violated its laws.'" 437 U.S. at 100, quoting *Arizona* v. *Washington*, *supra*, 434 U.S. at 509.

This case is essentially indistinguishable from *Scott* except that here respondent did not file a motion to dismiss the indictment. In both cases, the indictment was dismissed in mid-trial on grounds unrelated to guilt or innocence, and in neither case was there any reason why the trial could not have

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[*] As the court of appeals found (App. A, *infra*, 10a n.6), there clearly was no "manifest necessity" for the mid-trial dismissal in this case.

been completed before dismissing the indictment. See 437 U.S. at 100 n.13. The court of appeals' conclusion (App. A, *infra*, 9a) that the dismissal here was not a consequence of respondent's voluntary choice within the meaning of *Scott* turns on the fact that respondent did not "instigate" the dismissal issue and that the court retained "primary control" of the proceedings (see *id.* at 7a-8a), but this conclusion misreads the prior decisions of this Court. The relevant question is whether the trial court's action *deprives* the defendant of his right to a verdict by the first factfinder. See *United States* v. *Jorn*, *supra*, 400 U.S. at 484 (plurality opinion). As long as the defendant chooses to allow the first trial to be terminated, even if he does not instigate the termination, he has not been deprived of anything. He can retain "control" over the district court's course of action (see App. A, *infra*, 8a; *United States* v. *Dinitz*, *supra*, 424 U.S. at 609) by making an objection to the same extent that he can control it by making a motion. Failure to object will ordinarily reflect a defendant's choice just as surely as the filing of a motion. See *Lee* v. *United States*, 432 U.S. 23, 33-34 (1977).

Thus, the critical inquiry in determining whether a mid-trial termination deprives the defendant of his right to a verdict at the first trial is whether the defendant made a choice to allow the trial to be terminated. When the court has raised the possibility of terminating the trial and the defendant has a reasonable opportunity to object but fails to do so, the defendant clearly has made a choice to allow the trial to be terminated. Of course, there will be cases where the abruptness of the court's action gives the defendant no adequate opportunity to make a choice. For example, in *United States* v. *Jorn*, *supra*, the trial

court discharged the jury without warning in order to give certain witnesses an opportunity to consult with attorneys. See 400 U.S. at 473. Because the defendant there had no opportunity to object to the termination of the trial (*id.* at 487), he was denied his right to a verdict by the first factfinder and could not be retried.[4]

Here, however, it is clear that respondent had ample opportunity to object to the trial court's course of action, if he had so desired. The court made known at the morning session of trial that it was considering dismissing the case on *LaSalle National Bank* grounds (Tr. 193), and then, after a lunch recess, it conducted a lengthy hearing on the propriety of the summons at which it repeatedly stated its intention to dismiss the indictment if the summons were found to be improper (Tr. 207, 243). Moreover, even after the court announced from the bench that the indictment would be dismissed, a period of nearly three months passed before it entered a final order of dismissal. Cf. *United States* v. *Samango*, 607 F.2d 877, 880 (9th Cir. 1979). Because this was a bench trial, respondent could have requested at any time during this period that the trial be resumed, and he still would have received his verdict from the original factfinder. But respondent never indicated his desire to continue with the trial and obtain a determination of guilt or innocence by the original trier of fact;

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[4] The conclusion that the Double Jeopardy Clause barred Jorn's retrial was joined by only four Justices. Justices Black and Brennan concurred in the judgment on statutory jurisdictional grounds (400 U.S. at 488). It is not clear in light of the subsequent evolution of double jeopardy jurisprudence whether the Court would reach the same result today. It is clear, however, that whatever may be the continuing vitality of *Jorn*, the instant case is materially distinguishable.

he never raised any objection to the trial court's proposed dismissal. To the contrary, he actively participated in the questioning of the IRS agents at the hearing (see Tr. 200-206, 282-288) and argued to the court that the summons was improper (Tr. 193, 250). Indeed, at one point when the court seemed inclined to rule for the government, respondent succeeded in persuading the court that no "joint" investigation was underway when the summons was issued (Tr. 297-299, 303). Moreover, respondent prepared proposed findings for the court that called for dismissal of the case (C.R. 20). In these circumstances, it is clear that respondent had ample opportunity to object to the dismissal, but chose to forego his right to continue with the trial, embracing instead its premature termination in his favor.

The principles and policies of the Double Jeopardy Clause are not advanced by the court of appeals' decision, which permits a defendant to sit idly by and reap the windfall benefit of a bar to retrial following an erroneous dismissal, simply because the court raises the dismissal issue on its own motion. After all, the "valued right" to receive the verdict of the factfinder at the first trial is the defendant's right. In some instances, the defendant may prefer that the trial continue to its conclusion. See, *e.g.*, *Illinois* v. *Somerville*, *supra*.[5] In other cases, the defendant may prefer that the trial be terminated. See, *e.g.*, *United States* v. *Dinitz*, *supra*, 424 U.S. at 610. In an adversary system of criminal justice, the defendant—who is after all the only one who knows his

[5] Of course, if the defendant makes known his desire that the trial continue and the court nonetheless terminates it, a retrial would ordinarily be barred unless the termination was occasioned by "manifest necessity." See *United States* v. *Evers*, 569 F.2d 876, 877-878 (5th Cir. 1978).

own preference on the question—should have some obligation to inform the court whether he desires to proceed with the trial or, instead, whether he is content with a termination when one has been proposed by the court.

Requiring a defendant to register an objection to a mid-trial termination does not harm him in any way. He does not lose the benefit of the court's decision to dismiss the indictment if the trial proceeds to its conclusion. If he is acquitted, of course, there is no need to dismiss the indictment. If he is convicted, the trial court can still dismiss the indictment after the verdict, and, whatever the outcome of an ensuing appeal, there will be no need for a retrial. See *United States* v. *Scott*, *supra*, 437 U.S. at 100 n.13. The only possible cost to the defendant is that he may lose the windfall of an *erroneous* termination on a collateral ground—an interest not protected by the double jeopardy prohibition.

Apart from any desire to reap an undeserved windfall, the only reason for a defendant not to assert his right to continue the trial to conclusion is to avoid having to endure the balance of his first trial in a case where dismissal of the indictment may be appropriate. While this is not an interest protected by the Double Jeopardy Clause, because that provision does not protect the defendant from the burden of a single trial, premature termination of a trial can nevertheless be a significant benefit that defendants in many cases would desire even though a successful prosecution appeal would necessitate a retrial. In such cases, the defendants are free to ask for or acquiesce in a termination of their trial but there is no reason that they should then be able to use the termination they desired as a bar to a retrial. Rather, in a fair and rational system of justice, they

should shoulder the risk that the dismissal is erroneous and submit to a retrial if the dismissal is reversed on appeal.

The consequence of the court of appeals' decision is that, because of a legal error by the district court in the defendant's favor on a collateral matter, the government is denied any opportunity to try respondent for the crimes for which he was indicted. Society's strong interest in having "one complete opportunity to convict those who have violated its laws" (*Arizona* v. *Washington*, *supra*, 434 U.S. at 509), of course, must sometimes give way when it conflicts with a defendant's double jeopardy protection. See, *e.g.*, *United States* v. *Jorn*, *supra*. But where, as here, no interest protected by the Double Jeopardy Clause would be offended, it is serious error to deny the government the opportunity to bring a defendant to trial. Such a result can only engender disrespect for the criminal justice system and confuse the development of coherent principles under the Double Jeopardy Clause.

2. In addition to its divergence from the principles underlying this Court's decisions in this area, the court of appeals' decision is at odds with several lower court decisions in placing undue reliance on respondent's failure to make a motion to dismiss and declining to consider respondent's failure to object to the court's proposed dismissal. In the mistrial context, several courts have recognized that the totality of the circumstances may show a consent to a declaration of a mistrial by a defendant who has not formally expressed a desire for a mistrial.[6]

[6] As long as the termination is not an acquittal, there is of course no material difference for purposes of the present issue between dismissals and mistrials. See *United States* v. *Scott*, *supra*, 437 U.S. at 94-98; *Lee* v. *United States*, *supra*, 432 U.S. at 28-31.

In *United States* v. *Phillips*, 431 F.2d 949, 950 (3d Cir. 1970), the court of appeals held that, because of the defendant's failure to object to the court's proposed course of action, no serious double jeopardy problem was presented by the lower court's declaration of a mistrial. In *United States* v. *Gordy*, 526 F.2d 631, 635 n.1 (5th Cir. 1976), the court explained that implied consent vitiates a double jeopardy claim when the defendant does not timely object to declaration of a mistrial. In *Scott* v. *United States*, 202 F.2d 354, 355-356 (D.C. Cir.), cert. denied, 344 U.S. 879 (1952), the court found that a mistrial was manifestly necessary as to three defendants affected by a mid-trial withdrawal of counsel. The court went on to reject the double jeopardy claim of the fourth defendant because he did not object to the mistrial. See also, *United States* v. *Gentile*, 525 F.2d 252, 255 (2d Cir. 1975), cert. denied, 425 U.S. 903 (1976); *United States* v. *Beckerman*, 516 F.2d 905, 909 (2d Cir. 1975); *United States* v. *Sedgwick*, 345 A.2d 465 (D.C. 1975), cert. denied, 425 U.S. 966 (1976).

Thus, there is a fundamental conflict between the approaches of these courts and that of the court below with respect to the degree to which a defendant must take express and affirmative action to demonstrate his desire for a termination or continuation of his trial. Perpetuation of this variance in approach can have only a deleterious effect on the administration of justice. This Court should grant review here to clarify the obligation of a defendant to make known his preference when he is faced with the prospect of a termination of his trial before verdict. Such disclosure will greatly assist the trial court in reaching the correct decision, both because it can

take into account the defendant's desires and because it can predict with certainty what the effect of its decision will be on the government's right to appeal. The defendant who fails to make known his wish to protect his right to proceed to verdict and to avoid the possibility of a second trial, despite an opportunity to do so, can not justifiably be treated differently from the defendant who affirmatively requests a termination of the trial.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1981

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 80-1536

UNITED STATES OF AMERICA, APPELLANT

v.

JACK DAHLSTRUM, APPELLEE

Argued and Submitted Feb. 5, 1981
Decided Sept. 8, 1981

Appeal from the United States District Court
Central District of California

Before KILKENNY, FLETCHER and CANBY, Circuit Judges.

KILKENNY, Circuit Judge:

This is an appeal by the government from a judgment dismissing a three-count indictment with prejudice. Because reversal would necessitate a retrial barred by the double jeopardy clause, we dismiss the appeal.

FACTUAL BACKGROUND [1]

The appellee was charged in a three-count indictment with willful failure to file individual income tax returns for the years 1973-1975, in violation of 26 U.S.C. § 7203. Following appellee's plea of not guilty,

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[1] The district court opinion, *United States* v. *Dahlstrum*, 493 F.Supp. 966 (C.D. Cal. 1980), contains a detailed factual statement.

and waiver of trial by jury, the district court began hearing testimony on April 13, 1980 [*sic*].

During the presentation of the government's case, the court heard the testimony of Ostrove, an attorney who had represented appellee prior to this trial. Ostrove testified that after appellee's accountant had received an administrative summons to produce Dahlstrum's law partnership's accounting records, he had contacted an IRS special agent, Marc Schreiber, to discuss a possible civil settlement of appellee's delinquent taxes. Schreiber, the agent who had issued the summons, told Ostrove that he was not interested in the civil aspects of Dahlstrum's case. At that point, the trial judge became concerned that the IRS had abused its power by issuing a § 7602 summons in an investigation that had solely criminal purposes. *See United States* v. *La Salle National Bank*, 437 U.S. 298, 98 S.Ct. 2357, 57 L.Ed.2d 221 (1978).

The government called Special Agent Schreiber to the stand in an attempt to eliminate the judge's concern. Schreiber's testimony had the opposite effect. The judge grew increasingly disturbed over the events in question, and ordered the special agent's group manager, Sullivan, to appear and explain the IRS's practices and procedures. Sullivan was questioned almost exclusively by the trial judge, although at one point defense counsel asked the witness a few questions. Sullivan testified that, as an institutional practice, special agents issue § 7602 summonses before a cooperating revenue officer has been brought in on the case. On the basis of Sullivan's testimony, the judge orally dismissed the indictment against appellee because of governmental misconduct. The judge suggested that defense counsel prepare findings of fact and conclusions of law, and submit them

to the court within 30 days. Defense counsel complied with this suggestion.

The district court formally entered its judgment on July 11, 1980, ordering, *inter alia*, that the indictment be dismissed with prejudice, and that the appellee be acquitted from all charges contained in the indictment. The district court did not adopt the defense counsel's findings of fact and conclusions of law. Rather, the court made its own decision, including findings and conclusions. The government appeals.[2]

ISSUE

Although other issues are addressed by the parties, we hold that the issue of double jeopardy[3] is dispositive of the case.

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[2] On the merits, the government contends that the district judge erred in dismissing the indictment. The government asserts that the IRS summons was not used improperly, and that even if it was appellee was not thereby entitled to dismissal. This latter contention is based on three arguments: (1) appellee waived such a claim by failing to raise it prior to trial, (2) appellee had no standing to challenge an IRS summons issued to a third party, and (3) dismissal was an inappropriate remedy because any "tainted" evidence (and the government contends that there was no such evidence introduced at trial) could have been suppressed. Because of our disposition of this appeal, it is unnecessary to comment on these contentions. We express no opinion on the government's claims, and this disposition should not be construed as an approval of the district judge's reading of *La Salle National Bank*, *supra*, and progeny.

[3] Appellant concedes that jeopardy had attached in the district court proceedings. *See Serfass* v. *United States*, 420 U.S. 377, 388, 95 S.Ct. 1055, 1062, 43 L.Ed.2d 265 (1975).

DISCUSSION

Appellee alleges that the double jeopardy clause bars this appeal, because (1) the ruling of the district court constituted an acquittal, (2) the termination of the trial was not the result of his voluntary choice, and (3) there was no "manifest necessity" for the termination of the trial. We need not decide whether the disposition below constituted an acquittal because we hold that this appeal is barred since appellee did not seek a termination of the trial on non-guilt related grounds.

It is fundamental that the government has no right of an appeal in a criminal case, absent explicit statutory authority. *United States* v. *DiFrancesco*, —— U.S. ——, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980); *United States* v. *Scott*, 437 U.S. 82, 84-5, 98 S.Ct. 2187, 2190-91, 57 L.Ed.2d 65 (1978). 18 U.S.C. § 3731 [4] authorizes appeals by the government except when the double jeopardy clause prohibits further prosecution. Congress, by enacting § 3731, intended to remove all statutory barriers to government appeals and to allow appeals whenever the Constitution would permit. *DiFrancesco, supra; United States* v. *Wilson*, 420 U.S. 332, 337, 95 S.Ct. 1013, 1018-19, 43 L.Ed.2d 232 (1975).

The law attaches particular significance to an acquittal. The Supreme Court has held that the Constitution does not permit a judgment of acquittal to be

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[4] 18 U.S.C. § 3731 provides, in part:

> "In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution."

appealed when a second trial would be necessary upon reversal. *DiFrancesco, supra; Scott, supra*, 437 U.S. at 91, 98 S.Ct. at 2194. A "defendant is acquitted only when 'the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged.' [*United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 571, 97 S.Ct. 1349, 1354, 51 L.Ed.2d (1977)]." *Scott, supra*, 437 U.S. at 97, 98 S.Ct. at 2197.

There is some evidence to support appellee's contention that the district judge's disposition constituted an acquittal. It is clear that the district judge had serious doubts as to whether the government had established its case beyond a reasonable doubt. Appellee calls our attention to the following colloquy between the court and the prosecutor:

> "THE COURT: I know. But I haven't found anything so far, I must tell you. The evidence so far indicates lack of guilt, if you take the presumption of innocence together with the burden upon the government to prove each and every essential element of the crime charged and if you look at the cases which I point out to your requiring specific intent even in misdemeanor IRS cases, specific intent, which means voluntarily and intentionally and with specific intent to do something the law forbids with a bad purpose to disobey or disregard the law. I haven't found it beyond a reasonable doubt so far.
>
> If you want to ask my opinion now, I'll tell you.
>
> MR. KLUGER: Well, there are certain matters that I would venture to put before this Court that have been testified to that would indi-

cate everything you have required; however, I don't know if it's my position at this time to elaborate on them.

THE COURT: This isn't the time for argument, but you suggest to me that I find him guilty, and that's a suggestion I find without merit at this stage."

In addition, the judge, when he orally dismissed the case with prejudice, stated: "Now, I don't think that any case can be made beyond what's been made, so I'm going to dismiss it with prejudice, and then it will be up to the government to do what they wish about it. I think that it's an appropriate dismissal." The judgment entered on July 11, 1980, states, in part: "Defendant is acquitted of and from any and all counts and charges contained in said indictment."

The judge's characterization of his actions, however, does not control. *Scott*, *supra*, at 96, 98 S.Ct. at 2196; *United States* v. *Gonzales*, 617 F.2d 1358, 1361 (CA9 1980), *cert. denied sub nom. Patel* v. *United States*, —— U.S. ——, 101 S.Ct. 268, 66 L.Ed.2d 129. After reviewing the entire record, we cannot conclude, with any degree of certainty, that the district judge's disposition *actually represented* a resolution of any of the factual elements of the offense charged. The judge, in response to the contention that appellee had waived findings of fact, stated: "Yes. That's on the merits, but this is on another matter now. This is not on the merits that I'm deciding this case. It's on the question of governmental impropriety." The court's decision and order, filed on July 11, 1980, dealt exclusively with "governmental misconduct", and clearly stated that the dismissal was on that basis. Because of the lack

of clarity in the record, we do not rest our holding on the district judge's "acquittal" of appellee.[5]

Because there does not appear to have been a resolution of the factual elements of the offenses charged, a reversal of the dismissal would clearly require additional proceedings. Appellee asserts that a retrial would violate the double jeopardy clause's prohibition against multiple prosecutions. The Supreme Court, however, has stated that a second prosecution does not offend the double jeopardy clause if "the defendant is *responsible* for the second prosecution." *Scott, supra*, 437 U.S. at 96, 98 S.Ct. at 2196. (Emphasis added). A "defendant, by *deliberately choosing* to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he is accused, suffers no injury cognizable under the Double Jeopardy Clause if the Government is permitted to appeal from such a ruling of the trial court in favor of the defendant." *Id.* at 98-99, 98 S.Ct. at 2197-98. (Emphasis added). This "exception" from the double jeopardy bar clearly contemplates a significant level

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[5] Appellant also asserts that a resolution of any of the factual elements of the case would have been premature because it had not yet completed its case-in-chief. Appellant notes that it cut short its examination of special agent Schreiber when the judge made it clear that he was only interested in the summons issue. Appellee asserts that the government did not have any additional evidence on the specific intent issue, and that, therefore, the judge's suggestion that he was not yet convinced that the government had met its burden of proof was the equivalent of a specific resolution of a factual element of the offense charged. Since we do not rely ultimately on the "acquittal" of appellee, we need not address whether a resolution of any of the factual elements of the offense would have been premature.

of participation by the defendant in bringing about a termination of his trial prior to a determination on the merits. The Supreme Court in *Scott*, emphasized this by its descriptions of the sort of defense participation which removes any double jeopardy problem, *e. g.*, the defendant "elected to seek termination", made a "voluntary choice", "successfully avoided [a decision on the merits] . . . *by persuading the trial court to dismiss*", "undertook *to persuade the trial court not to submit the issue of guilt or innocence to the jury*", "obtain[ed] the termination", and "[*sought*] *to have the trial terminated.*" (Emphasis added). The Court stressed the importance of the defendant retaining "primary control over the course to be followed." *Id.* at 94, 98 S.Ct. at 2195 (quoting *United States* v. *Dinitz*, 424 U.S. 600, 609, 96 S.Ct. 1075, 1080, 47 L.Ed.2d 267 (1976)). In *Scott*, the defendant moved before trial and twice during for dismissal of two counts of the indictment on the ground that his defense had been prejudiced by pre-indictment delay. The trial court, at the close of all the evidence, granted the motion. The Court held that, because the defendant could be considered *responsible* for any reprosecution, the government's appeal was not barred by the double jeopardy clause.

Here, *the judge was the instigator and the primary mover of the events that led to the dismissal of the indictment. The record convinces us that the judge took complete control of the proceedings and set off on a course over which appellee had practically no control.* Nowhere does it appear that the judge, prior to the oral dismissal of the indictment, even consulted appellee on what course of action to take. For that matter, the judge's words and actions indicated that his primary concern was not with the case before him, but with the effect of his actions on future

IRS investigations. The entire record indicates that the judge had no interest in completing the trial. Appellee's involvement in the termination of the trial was at best minimal and in no way reached the high degree of participation that was present in *Scott*. Nor can it be said that appellee retained "primary control" over the course of the trial. *Dinitz*, *supra*, at 609, 96 S.Ct. at 1080. For that matter, the record shows that he had no control over what was occurring. The mere fact that appellee's counsel complied with the judge's request to prepare findings of fact and conclusions of law prior to the formal entry of judgment is of no consequence. The transcript clearly shows that the judge did not believe the government had proved its case. In these circumstances, there is no doubt but that appellee wanted the judge to decide the case in his favor. Appellee certainly was not seeking to avoid a decision by the trier of fact. His relatively passive role should not be taken to reflect anything beyond a keen appreciation of the fact that the judge had taken over the proceedings.

We do not believe that appellee can be considered *responsible* for the termination of his trial. He did not "voluntarily choose" to avoid submitting the case to the trier of facts on the merits, in the sense the Supreme Court described in *Scott*. We can find no persuasive justification for an expansive reading of *Scott*. In fact, the serious risks to double jeopardy clause values presented by multiple prosecutions caution against such a construction.

We conclude that appellee did not "seek" the termination of the trial and hold that his minimal participation did not fall within the rule stated in *Scott*.

CONCLUSION

We conclude that even though the trial court's decision may not have been a factual determination of guilt or innocence, the government's appeal is barred by the double jeopardy clause because appellee did not "seek" the termination of his trial.[6] Consequently, the appeal is dismissed.

IT IS SO ORDERED.

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[6] Appellee, out of an abundance of caution, argued that there was no "manifest necessity" for the dismissal. *See Arizona* v. *Washington*, 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978). The government does not argue that there was "manifest necessity", and, in fact, its argument that dismissal was unnecessarily severe is irreconcilable with a claim of "manifest necessity." Furthermore, although the Supreme Court has recently treated mistrials and dismissals similarly, we are not convinced that the "manifest necessity" analysis applies when a subsequent prosecution is not contemplated. In any event, the arguments of both parties convince us that it was not manifestly necessary to terminate the bench trial prior to a resolution on the merits. The judge, because of his desire to send the IRS "a message", did not consider available alternatives.

APPENDIX B

UNITED STATES DISTRICT COURT
C. D. CALIFORNIA

Crim. No. 80-187-AAH

UNITED STATES OF AMERICA, PLAINTIFF

v.

JACK A. DAHLSTRUM, DEFENDANT

July 11, 1980

DECISION AND ORDER

HAUK, District Judge.

The defendant, Jack A. Dahlstrum, was charged in a three count indictment with wilful failure to file individual income tax returns for the years 1973 through 1975 in violation of 26 U.S.C. § 7203.[1] Following the defendant's not guilty plea and waiver of jury trial, this Court began hearing testimony in this matter on April 14, 1980.

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[1] 26 U.S.C. § 7203 provides as follows:

> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than one year, or both, together with the costs of prosecution.

During the trial, however, this Court heard testimony which raises serious questions concerning the procedures followed by the Internal Revenue Service in the investigation of defendant Dahlstrum. Specifically, this Court was interested in the basis, propriety, and good-faith of the IRS in issuing to the defendant's accountant an administrative civil summons, pursuant to its authority under 26 U.S.C. § 7602.[2] In light of the testimony, this Court, on its own motion, undertook to determine whether or not there were any violations of the defendant's rights by the IRS, as set forth in *United States* v. *LaSalle National Bank*, 437 U.S. 298, 98 S.Ct. 2357, 57 L.Ed.2d 221 (1978) and its progeny. Following that inquiry, this Court has determined to its complete satisfaction that the issuance of the summons was unlawful, because the IRS had abandoned its investigation of the defendant's civil tax liability at the time the particular summons was issued in this case. Concluding that the governmental misconduct has tainted the entire prosecution of the defendant, this Court then orders that the indictment be dismissed with prejudice.

I. BACKGROUND

The defendant is an attorney admitted to the California Bar who actively practiced law from 1958 to 1976. He specialized in trial work and his criminal

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[2] Under 26 U.S.C. 7602, the Internal Revenue Service is authorized to summon any person having possession, custody or care of books, records, papers, or other data which may be relevant or material to the "purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax . . . or collecting any such liability."

tax practice including acting as counsel for Mickey Cohen during the latter's famous tax prosecution.

In his trial memorandum, defendant Dahlstrum admitted that he did not file his personal income tax returns for 1973, 1974, and 1975 on a timely basis. He indicated that the returns for these years were filed delinquently on June 14, 1977. Dahlstrum also asserted that he had a history of "late filing" which quite often resulted in the assessment of civil penalties. He attributed this pattern of late filing to a long history of negligent handling of his personal affairs. Four marriages and borderline alcoholism allegedly reduced him to such a "chaotic and self-destructive" state that it caused him to leave his lucrative law practice in early 1976. Finally, Dahlstrum claimed that in spite of these personal difficulties, he had engaged an accountant and an attorney to assist him in preparing his tax returns for 1973 through 1975 prior to the Internal Revenue Service's initiation of the criminal investigation into his affairs.

During the presentation of the government's case, this Court heard the testimony of David Ostrove, an attorney who had represented Dahlstrum at the time the IRS initiated its criminal investigation in this case. Ostrove testified that he had contacted Special Agent Marc Schreiber of the IRS's Intelligence Division [3] following the issuance to Dahlstrum's accountant of an administrative summons on February 3,

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[3] The Intelligence Division is now known as the Criminal Investigation Division and is responsible for developing evidence required to prove criminal violations and the ad valorem penalties for civil fraud, negligence, and delinquency. See: Internal Revenue Manual, Ch. 4500, § 4565.31(4) (CCH 1979).

1977. This Court became particularly concerned when Ostrove stated that Schreiber had refused to discuss the civil end of the investigation with him and was told that Schreiber was interested only in the criminal aspects of the case. Ostrove further testified that Schreiber took this position on more than one occasion following the issuance of the summons.

At that point, this Court, very much troubled by the purport and potential significance of Ostrove's testimony, initiated an inquiry for the purposes of ascertaining whether there were any violations of the defendant's rights under *United States* v. *LaSalle National Bank*, 437 U.S. 298, 98 S.Ct. 2357, 57 L.Ed.2d 221 (1978) and its progeny. The Supreme Court in *LaSalle*, Mr. Justice Blackmun writing for the majority, established several requirements for the issuance of a valid summons by the IRS under § 7602. Initially, the summons must be issued before the IRS makes a criminal referral or recommendation for prosecution to the Department of Justice. 437 U.S. at 318, 98 S.Ct. at 2368. In addition, the IRS is required to use its summons authority "in good faith pursuit of the congressionally authorized purposes of § 7602" and to adhere to the standards set forth in *United States* v. *Powell*, 379 U.S. 48, 57-58, 85 S.Ct. 248, 255, 13 L.Ed.2d 112 (1964).[4]

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[4] In *Powell*, the Supreme Court delineated several elements which go to the exercise of good-faith under § 7602:

> [the Service] must show that the investigation will be conducted pursuant to a legitimate purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed . . . [A] court may not permit its process to be abused. Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to

LaSalle at 318. The Supreme Court further held that the IRS's summons authority did not exist to aid solely criminal investigations and that Congressional purposes would be thwarted if the IRS abandoned in an "institutional" sense the pursuit of civil tax determination or collection. *Id.* at 316, n. 18, 317-318, 98 S.Ct. at 2367, 2368. The inquiry conducted here by this Court, therefore, was directed to whether the IRS's criminal investigation of the defendant was in compliance with the good-faith restraints set forth in *LaSalle.*

II. THE IRS CRIMINAL INVESTIGATION OF DAHLSTRUM

The IRS criminal investigation of the defendant had its genesis in a referral made by its Collection Division to the Intelligence Division on May 17, 1976, when the referring revenue officer, R. D. Leslie, determined that Dahlstrum had not filed federal income tax returns for the calendar year 1973 and later years. At the time of the referral, Leslie terminated further collection efforts regarding a 1972 income tax deficiency of the defendant and ceased his civil investigation of Dahlstrum's failure to file income tax returns for the calendar years subsequent to 1972.

Under IRS procedure, within 20 workdays after receipt of the referral report, the Intelligence Division must notify the referring division whether the referral has been declined or accepted for investigation and whether or not a cooperating civil officer is requested. Internal Revenue Manual, Ch. 4500,

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put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation." 379 U.S. at 57-58, 85 S.Ct. at 225.

§ 4565.23(2) (CCH 1979). If a referral is accepted by the Intelligence Division, a "joint investigation," in IRS parlance, may be initiated.

While the referral made by Revenue Officer Leslie was subsequently accepted by the Chief of the *criminal* Intelligence Division, a cooperating *civil* revenue officer was *not* requested at that time.[5] On November 12, 1976, Special Agent Joseph W. Enders, a member of the Intelligence Division, was assigned by the Division Chief to handle the criminal investigation of Dahlstrum for failure to file income tax returns and failure to pay taxes in violation of 26 U.S.C. § 7203. However, on January 14, 1977, Special Agent Marc Schreiber, also a member of the Intelligence Division, was assigned to handle Dahlstrum's criminal investigation case because of Special Agent Enders' heavy caseload.

On February 3, 1977, Schreiber, with the approval of his group manager, Thomas W. Sullivan, then issued the statutorily authorized *civil* summons to Dahlstrum's accountant, pursuant to § 7602. This summons sought the production of books and records possessed by the accountant relating to Dahlstrum and his law partnership, including the partnership returns for the calendar years 1973, 1974 and 1975.

Following the issuance of this civil summons, Dahlstrum's attorney, David Ostrove, sought in vain to obtain the cooperation of the IRS in dealing with the civil side of the Dahlstrum tax investigation.[6]

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[5] On the standard referral form utilized by Leslie was a box indicating whether a cooperating revenue officer was requested to be assigned to the case. This box was never checked.

[6] On or about February 4, 1977, Ostrove telephoned Schreiber regarding the summons. Schreiber at that time refused

Ostrove attempted without success to locate any revenue officer in either the Los Angeles or Riverside County offices of the IRS who knew anything about Dahlstrum's civil tax status. Because of the difficulty he was having in settling the amounts and making payment of Dahlstrum's back taxes, on a number of occasions during this period, Ostrove also endeavored to discuss the civil aspects of the case with Schreiber. He wrote to Schreiber on June 13, 1977, indicating that Dahlstrum intended to file his 1973 through 1975 returns the next day (June 14, 1977) and requested Schreiber's cooperation in setting up a payment schedule for Dahlstrum's delinquent returns. Ostrove explained that Dahlstrum wished to reestablish his law practice without the cloud of the IRS hanging over his head. Ostrove also informed Schreiber that Dahlstrum had begun his arrangements for the filing of his returns prior to any contact by IRS criminal investigative Special Agents and that the payment of the taxes on those returns was not the result of any contact by such Special Agents. It is not clear whether or not Ostrove was aware at the time that a cooperating revenue officer, Michael Maynard, had been assigned on May 23, 1977, to assist Schreiber in developing the IRS criminal investigation. Despite the assignment of Maynard, however, the general response Ostrove received to his June 13, 1977 request, as well as to others made during the period following the issuance of the summons, was that the civil end of the investigation was

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to discuss the case with Ostrove, but did relate that he was not interested in either the civil aspects of the case, or whether the taxes owing to the IRS were paid or not. Subsequently, on February 14, 1980, the requested documents were turned over to the IRS.

not in Schreiber's department or within his province to act upon.[7]

On January 3, 1978, Schreiber and Maynard culminated their investigation with the filing of a joint report which recommended that criminal prosecution referral and fraud penalty be pursued in Dahlstrum's case.

III. THE IRS "INSTITUTIONAL BAD FAITH" IN LIGHT OF LaSALLE AND ITS PROGENY

Assuming that this Court's inquiry into the issuance of the summons was proper,[8] two issues emerge

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[7] Ostrove also sent another letter to Schreiber dated July 7, 1977, requesting a response to his letter of June 13, 1977. In this July 7 letter he reiterated his request that Schreiber forward a copy of his earlier letter to an appropriate collection officer and further stated that Dahlstrum did not want to resume the practice of law until a payment plan had been agreed to with the I.R.S.

[8] This Court recognizes that in a typical *LaSalle* hearing it is the taxpayer who normally assumes the burden of challenging the IRS's good faith in issuing an administrative summons and that this burden is a heavy one, not met by a mere conclusionary showing. *U.S.* v. *LaSalle National Bank*, 437 U.S. at 316, 98 S.Ct. at 2367; *U.S.* v. *Powell*, 379 U.S. at 58, 85 S.Ct. at 255 (1964). The usual *LaSalle* inquiry arises when a taxpayer challenges the enforcement of an IRS summons. However, in this matter criminal trial proceedings had already been initiated against the defendant when potential *LaSalle* problems were raised. Thus, for this Court to initiate and conduct a *LaSalle* inquiry on its motion becomes somewhat of a departure from a normal *LaSalle* hearing. The Supreme Court in *Powell*, in reaffirming the taxpayer's right to challenge the enforcement of an IRS summons, added that since it was "the court's process which is invoked to enforce the administrative summons," a court could not permit its process to be abused. 379 U.S. at 58, 85 S.Ct. at 255. Thus, it would be anomalous, indeed, if this Court, in the

in the application of *LaSalle* to the facts of this case. The first issue relates to the question of when during an IRS investigation the Court may apply *LaSalle's* good-faith restraints on the IRS. The second issue concerns the circumstances under which "institutional bad faith" may be found if there is evidence to indicate that the summons was iussed "solely to aid a criminal investigation."

The problem of when a court may apply *LaSalle* to an IRS investigation becomes significant in light of the fact that Special Agent Schreiber during his solely criminal investigation issued the challenged summons prior to his January 3, 1978 recommendation to his superiors that a criminal referral be made, and prior to the IRS criminal referral to the Justice Department. In *LaSalle*, the Court indicated that the critical period of focus for the purposes of determining IRS bad faith, normally should be after a criminal referral is made to the Justice Department by the IRS. The majority felt that an earlier imposition of the good-faith requirements might unduly hamstring the ability of the Service to perform its duties and that the possibility of agency abuse was remote at such an early stage. *United States* v. *LaSalle National Bank*, 437 U.S. 298, 313 n. 15, 98 S.Ct. 2357, 2365 n. 15, 57 L.Ed.2d 221.

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exercise of its discretionary and supervisory powers were not permitted to initiate an inquiry on its own motion in order to preserve and protect the principles laid down by the Supreme Court in the summons enforcement cases. A court must be permitted to query and determine whether there is evidence of a *LaSalle* violation once jeopardy has attached and criminal proceedings against a defendant have begun. This represents the only logical result if a defendant's due process rights are to be maintained and the Court's process to remain inviolate and unabused.

The Court did state, however, that despite the "co-terminous" aspects of criminal and civil fraud liabilities,* it could not countenance an abandonment of the good-faith inquiry when there existed an institutional commitment to refer a case for criminal prosecution and the civil summons under § 7602 was still issued. This could occur in situations where there was a delay in submitting a criminal referral and where the Service was gathering additional evidence for a criminal prosecution. *Id.* at 316-17, 98 S.Ct. at 2367. The Court held that such delays "would be tantamount to the use of the summons authority after the recommendation and would permit the Government to expand its criminal discovery rights." *Id.*, at 317, 98 S.Ct. at 2368. Thus the good-faith standard was not to be construed as permitting the IRS to become an "information-gathering agency" for other governmental departments, including the Department of Justice. *Id.*

In this connection, the *LaSalle* Court suggested that an "institutional" commitment to prosecute before a criminal referral has been made to the Justice Department could possibly be shown after a Special Agent has made a recommendation to his

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* Justice Blackmun wrote that the IRS's performance of its civil functions "is not necessarily overturned by a single agent who attempts to build a criminal case," and for the IRS to conduct a solely criminal investigation "would require an extraordinary departure from the normally inseparable goals of examining whether the basis exists for criminal charges and for the assessment of civil penalties." 437 U.S. at 314, 98 S.Ct. at 2366. Nevertheless, Justice Blackmun did conclude later that IRS institutional bad faith could result in situations where a summons was issued and there already existed an institutional commitment to refer the case for criminal prosecution. *Id.* at 316-317, 98 S.Ct. at 2367.

superiors.[10] The Court was reluctant, however, to apply *LaSalle* to situations where the Special Agent had not yet recommended to his superiors that a criminal referral be made. Underlying this view, no doubt, was the Court's concern that it might cause unnecessary delays in IRS investigations and otherwise impede the IRS's ability to adequately perform its "co-terminous" civil and criminal functions.

However, application of the *LaSalle* doctrine at an earlier stage of a solely criminal investigation was not ruled out by the Supreme Court. The *LaSalle* majority, in observing that deliberate delay of a referral could not be condoned, also recognized that "other forms of agency abuse of congressional authority and judicial process" might arise in future cases. *Id.* at 318 n. 20, 98 S.Ct. at 2368 n. 20. Therefore, since the facts here in this case present a rather novel form of *LaSalle* governmental misconduct, this Court finds that it is not precluded from applying *LaSalle* to the civil summons issued by Schreiber.

Moreover, this Court has the benefit of conducting its *LaSalle* inquiry from a perspective of hindsight. This advantage has a two-fold effect. First, looking at the issued civil summons from hindsight neutralizes the Supreme Court's legitimate concern that the

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[10] The Court pointed out that following an agent's recommendation that a criminal referral be made, the recommendation itself passes through several layers of review before the IRS makes its formal recommendation to the Justice Department that the matter be criminally prosecuted. During this period, an "institutional commitment" to prosecute could conceivably be formed (i.e., evidence that an agent's superiors were holding up approval of the recommendation or where the civil summons under § 7602 was issued during the review stage solely to aid the development of a criminal investigation for another government agency).

IRS might be hampered in the performance of its functions, because the IRS investigation in this case had already been completed and criminal trial proceedings initiated before the *LaSalle* question arose here. Secondly, many of the difficulties normally encountered in a *LaSalle* enforcement hearing are nullified, thereby making easier the analysis of the challenged summons. *See*: Note, "The Institutional Bad Faith Defense to the Enforcement of IRS Summonses," 80 Column. L.Rev. 621, 627 n. 45 (1980).

Thus, assuming the application of *LaSalle* to this case to be appropriate, the focus shifts to the IRS "institutional bad faith" in issuing a summons to Dahlstrum. As stated earlier, the Supreme Court in *LaSalle* provided two examples of institutional bad faith which could not be condoned: a delay in a recommendation of prosecution to the Justice Department in order to acquire additional information for use at trial, and issuance of the summons for the purposes of gathering information for the use of other agencies. 437 U.S. at 317, 98 S.Ct. at 2368. From the facts presented to this Court here, the "information-gathering" form of abuse is clearly relevant to this case, because the evidence obtained by the civil summons was later utilized by the Justice Department in this criminal prosecution. Moreover, the absence of any ongoing IRS civil investigation of the defendant necessarily arouses judicial curiosity and an inquiry as to whether in fact there was some sort of nexus between the IRS's criminal investigation and the subsequent Justice Department prosecution.

In *LaSalle*, Justice Blackmun addressed the question of whether a summons could issue under § 7602 to further a criminal investigation:

> The Service does not enjoy inherent authority to summon production of the private papers of citizens. It may exercise only that authority granted by Congress. In § 7602 Congress has bestowed upon the Service the authority to summon production for four purposes only: for 'ascertaining the correctness of any return, making a return where none had been made, determining the liability of any person for any internal revenue tax . . . or collecting any such liability.' Congress therefore intended the summons authority to be used to aid the determination and collection of taxes. These purposes do not include the goal of filing criminal charges against citizens. Consequently, summons authority does not exist to aid criminal investigations solely." 437 U.S. 316-17, n. 18, 98 S.Ct. 2367 n. 18.

In *United States* v. *Genser*, 595 F.2d 146 (3d Cir. 1979), *cert. denied*, 444 U.S. 928, 100 S.Ct. 269, 62 L.Ed.2d 185 (1979), the substantive implications of *LaSalle* vis-a-vis "solely criminal investigations" were discussed further.[11] The Third Circuit interpreted the *LaSalle* Court's holding that a summons may not be used "solely for a criminal purpose" to mean that the IRS must show that the validity of a summons does not simply rest upon the existence of a "general civil purpose" for the entire investi-

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[11] In addition to *Genser* there are a number of decisions following *LaSalle* which have grappled with its implications. *See, e.g., United States* v. *Cortese*, 614 F.2d 914 (3d Cir. 1980); *United States* v. *Serubo*, 604 F.2d 807 (3d Cir. 1979); *United States* v. *Chase Manhattan Bank*, 598 F.2d 321 (2d Cir. 1979); *United States* v. *Schutterle*, 586 F.2d 1201 (9th Cir. 1978); *United States* v. *Marine Midland Bank*, 585 F.2d 36 (2d Cir. 1978).

gation, but rather upon the purposes of the individual summons in issue. 595 F.2d at 150. In formulating this standard,[12] the *Genser* Court found that if any individual summons was issued for solely criminal purposes, it would be unlawful, even in the face of evidence as to a civil purpose for the investigation as a whole. *Id.* at 150. The Third Circuit reasoned that this interpretation was necessary to protect the taxpayer from facing an almost impossible burden of proof, since he or she would be required to show the absence of civil tax consequences in an IRS investigation even though the *LaSalle* Court had stated that civil and criminal liability are "coterminous."

In addition, the *Genser* Court recognized that the principles of good-faith enunciated in *LaSalle* would be circumvented in that abuses "would go undetected and unremedied." *Id.* Thus, to permit the IRS to argue that a civil investigation is ongoing because the taxpayer's civil liability has not yet been determined, would permit the IRS to become an information-gathering tool for the Justice Department. As the *Genser* Court pointed out, the principles of restraint set forth in *LaSalle* prohibit such subterfuge. *Id.*

The "summons-by-summons" approach adopted in *Genser* becomes important in light of the position the IRS took in this case with respect to its civil investigation of Dahlstrum. The IRS attempted to argue that it was conducting a "joint" investigation

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[12] A clear explanation of the relative merits of the "general civil purpose" test versus the "summons-by-summons" test adopted in *Genser* is provided in Note, "The Institutional Bad Faith Defense to the Enforcement of IRS Summonses," 80 Column.L.Rev. 621, 626-628 (1980).

of Dahlstrum at the time the summons was issued. A joint investigation is one conducted by the Criminal Investigation Division, together with either the Examination or Collection Divisions.[13] Internal Revenue Manual, ch. 9300, § 9324.1 (CCH 1979). Thomas W. Sullivan, Special Agent Schreiber's group manager, testified that the IRS viewed Dahlstrum's investigation as being "joint," despite the fact that no cooperating revenue officer had been requested or was involved in the case at the time the summons was issued by Schreiber. The IRS adopted the view that no active civil investigation need be ongoing at the time the summons was issued, because the results of the solely criminal investigation would have an "impact" upon the civil end of the IRS investigation.

This position is clearly at odds with the *Genser* "summons-by-summons" approach, because it inherently assumes that a "civil purpose" existed for the summons issued by Schreiber. If this Court were to accept the IRS's viewpoint on the conduct of its so-called joint investigation, then Dahlstrum could never prove the absence of civil tax consequences in his investigation. The dangers alluded to in *Genser* would then become very real. Thus, the appropriate and equitable standard to apply in analyzing the issuance of the summons by Schreiber is the *Genser* approach, which seeks to find a "link between each summons and the proffered civil purpose." 595 F.2d at 151.

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[13] For a general overview of IRS internal procedures and guidelines relating to joint investigations, see Internal Revenue Manual, ch. 9400 §§ 9324.2, 9324.3, 9324.31; ch. 4500, §§ 4565.3, 4565.31, 4565.32, 4565.42 (CCH 1979).

In applying *LaSalle* and *Genser* to the facts of this case, this Court in effect employs a two-prong test. The first prong probes into the existence of a "civil purpose" in the issuance of the summons to Dahlstrum. The second prong focuses upon whether the IRS was "information-gathering" solely to aid a criminal prosecution.

The absence of a civil purpose is made abundantly clear by the fact that the IRS's investigation here was fraught with deviations from normal operating procedure. IRS guidelines regarding joint investigations contemplate the presence of a cooperating civil revenue officer and spell out at great length the need for close cooperation between the criminal Special Agent and the cooperating civil revenue officer. *See generally*: I.R. Manual, ch. 4500, § 4565.32; ch. 9400, §§ 9324.2, and 9324.31 (CCH 1979). A cooperating revenue agent and Special Agent are to "continually and carefully review all taxpayer activity having an impact on the civil aspects." I.R. Manual, ch. 4500, § 4565.42(4) (CCH 1979). The Special Agent should also be "sufficiently familiar with the examination or collection features of the case." I.R. Manual, ch. 9300, § 9324.2(7)(a) (CCH 1979).

Yet, in the IRS investigation of the defendant, a cooperating civil revenue agent was not assigned until more than three months *after* the issuance of the summons in question. Special Agent Schreiber's refusal to discuss the civil aspects of the case becomes understandable because, concentrating solely on his criminal investigation he was completely ignorant of the civil status of the case and therefore unable to comply with the I.R. Manual guidelines.

In addition, the presence of other deviations prompted the Court to conclude that the IRS has failed to demonstrate a civil purpose for the issuance

of the summons: the inability during this period to locate any civil revenue officer knowledgeable as to the defendant's civil tax status; the fact that over a year lapsed between the time the matter was referred to the criminal Intelligence Division and when a cooperating civil revenue agent was finally assigned to the case; and the further fact that the original referral form sent to the Intelligence Division reflects that a cooperating civil agent was never requested.

A finding to the effect that there was an absence of a civil purpose for the summons is not sufficient to establish a *LaSalle* violation here. This Court still must find that the summons was issued for the purposes of gathering evidence for a criminal prosecution.[14] Viewing the IRS investigation from hindsight permits this Court to take cognizance of certain facts which normally may not be present at a *LaSalle* hearing conducted at the time the summons is issued. Specifically, it is noted that the defendant was an attorney who at one time represented a reputed notorious underworld figure. Dahlstrum was, by his

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[14] The gathering of evidence for other governmental departments, such as the Department of Justice, should not be restricted solely to situations where, for example, a U.S. Attorney has made a specific request that a summons be issued. The Supreme Court in *LaSalle* clearly recognized that the *Powell* elements of good-faith were not meant to be exclusive and that future cases would raise the need to prevent "other forms of agency abuse." 437 U.S. at 317-318, 98 S.Ct. at 2368. This case presents a form of IRS "institutional bad faith" which does not appear to have arisen in any of the cases to date, this Court believes it should not limit its focus to specific instances of a direct contact between the IRS and another governmental agency. Indeed, the facts of this case strongly support a more flexible approach in dealing with "information-gathering" by the IRS.

own admission, a chronic late filer of income tax returns who paid substantial civil penalties for the poor handling of his personal affairs. Also, the evidence adduced at this Court's *LaSalle* hearing overwhelmingly points to the fact that the IRS's investigation was not to determine and collect taxes from the defendant, but rather to build a criminal case against an attorney who at one time may have represented somewhat notorious clients.[15]

These observations, coupled with the subsequent indictment and prosecution, lead this Court to infer from the evidence presented that the IRS was gathering evidence to aid a solely criminal investigation of the defendant and that the issuance of the summons was not to aid the determination and collection of taxes from the defendant, but rather to build a criminal case against him, in violation of the strictures of *LaSalle*.

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[15] The Supreme Court in *LaSalle* made clear that the motives of a single agent are not dispositive in determining the issue of IRS "institutional bad faith." *LaSalle* at 314-15, 98 S.Ct. at 2366. However, Mr. Justice Blackmun stated that examination of agent motive could be relevant to evaluate the good faith elements of *Powell* in situations where the summons was issued to harass the taxpayer. *Id.* at 316 n. 17, 98 S.Ct. at 2367.

In this case, an inference of harassment might be drawn from the evidence which indicates that Dahlstrum always paid the civil penalties assessed for his dilatory conduct in filing income tax returns. While the IRS may have intended to harass Dahlstrum because of his association with reputed mobsters, this Court's decision does not, however, rest solely upon such a finding. Rather, the "institutional bad faith" found to have occurred in this case, results from a cumulation of IRS deviations in its investigation of the defendant, including but not limited to the observations stated above.

IV. DISMISSAL OF THE INDICTMENT

In concluding that the IRS was acting in "institutional bad-faith" when it issued a summons to Dahlstrum's accountant, this Court has before it the choice of ordering either suppression of the evidence obtained by the illegal summons or dismissal of the indictment. The need to employ this Court's supervisory powers to remedy governmental misconduct was powerfully expressed by Mr. Justice Brandeis in his famous dissenting opinion in *Olmstead* v. *United States*, 277 U.S. 438, 471-485, 48 S.Ct. 564, 570-575, 72 L.Ed. 944 (1928):

> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

The government's misconduct here does not simply involve the question of an illegal search and seizure. Rather, the IRS's unauthorized and "institutional bad faith" use of the authority provided to it by the Congress under § 7602 constitutes a form of agency

abuse and governmental misconduct tantamount to the type of prejudice which necessarily results in judicial condemnation of prosecutorial misconduct. *See: United States* v. *Samango*, 607 F.2d 877 (9th Cir. 1979); *United States* v. *Thompson*, 576 F.2d 784 (9th Cir. 1978); *United States* v. *Owen*, 580 F.2d 365 (9th Cir. 1978). In addition, it is clear that the scope of the inquisitorial power granted the IRS Commissioner under § 7602 is not unlike that vested in federal grand juries. *United States* v. *Cortese*, 540 F.2d 640, 642-643 (3d Cir. 1976); *United States* v. *Matras*, 487 F.2d 1271, 1274 (8th Cir. 1973). *See also: United States* v. *LaSalle National Bank*, 437 U.S. 298, 313 n. 15, 98 S.Ct. 2357, 2365 n. 15, 57 L.Ed.2d 221 (1978); *United States* v. *Bisceglia*, 420 U.S. 141, 147, 95 S.Ct. 915, 919, 43 L.Ed. 2d 88 (1975); *United States* v. *Powell*, 379 U.S. 48, 57, 85 S.Ct. 248, 255, 13 L.Ed.2d 112 (1964). Thus, it follows that IRS abuse of this civil inquisitorial power by its "institutional bad faith" failure to operate within the parameters of *LaSalle* and *Genser* approaches a level of flagrant prosecutorial misconduct which justifies the invocation and exercise of this Court's supervisory powers to remedy this misconduct.[16]

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[16] Following this Court's oral ruling in this matter, the Supreme Court in *United States* v. *Payner*, —— U.S. ——, 100 S.Ct. 2439, 65 L.Ed.2d 468 (1980), discussed the supervisory powers of the federal courts to suppress evidence seized illegally from a third party. The Court held that a federal court is not permitted to suppress the use of evidence unlawfully obtained from a party not before that court because the defendant could not satisfy the standing requirements of the Fourth Amendment. *See: Rakas* v. *Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978).

The *Payner* decision does not alter the result reached in this case because the IRS misconduct here tainted not only

Dismissal of an indictment is required only in flagrant cases of government overreaching. *See*: *United States* v. *Thompson*, 576 F.2d 784, 786 (9th Cir. 1978); *United States* v. *Roberts*, 481 F.Supp. 1385 (C.D. Cal. 1980). Here, dismissal is mandated by the overwhelming evidence of the IRS's flouting of the civil summons authority granted to it by the Congress. The result has been to subject the defendant to a criminal prosecution, which other extrinsic facts would suggest was perhaps unwise and selective. While dismissal is a strong remedy to apply, it serves as the only effective deterrent when a case reaches the criminal trial phase. This Court understands and respects the difficulties faced by the IRS in the performance of its assigned tasks. However, in view of the circumstances of this case, this Court feels compelled to dismiss the indictment with prejudice in order to preserve the interests of a taxpayer defendant subjected to this type of governmental misconduct, even though fueled only by "institutional bad faith" and not any personal bad faith.

The foregoing shall constitute the Court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a), and the Clerk shall serve copies hereof upon all counsel of record herein.

LET JUDGMENT BE ENTERED ACCORDINGLY.

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the evidence obtained from the illegal summons, but also spread contagiously to contaminate the entire criminal prosecution ultimately brought against the defendant. This Court, herein, does not believe that *Payner* should be read to limit the sound exercise of its supervisory powers when there so clearly exists a basis in fact and law for doing so.

JUDGMENT

The Court having made and entered its Decision and Order containing its findings of fact and conclusions of law herein, and good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. The Indictment herein, and each and every count thereof, is dismissed with prejudice.
2. Defendant is acquitted of and from any and all counts and charges contained in said Indictment.
3. Defendant's appearance bond and its obligors are exonerated and defendant and his bail are released.
4. The Clerk shall serve copies of this Judgment on all counsel of record herein.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 357781 679

Opposition

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS
CLERK

No. 81-973

IN THE

Supreme Court of the United States

October Term, 1981

UNITED STATES OF AMERICA,

Petitioner,

vs.

JACK A. DAHLSTRUM,

Respondent.

BRIEF IN OPPOSITION.

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Questions Presented.

Whether the Double Jeopardy Clause precludes the retrial of a defendant when the trial Court, *sua sponte*, with no substantial participation from the defendant, and without "manifest necessity", dismisses the indictment mid-trial in response to perceived governmental misconduct?

Whether the Double Jeopardy Clause precludes the retrial of a defendant when the trial Court, prior to the Government formally completing its case, finds that the Government has not established an essential element of the crime charged, and has entered a written order in part acquitting the defendant of all counts and charges contained in the indictment?

TABLE OF CONTENTS

	Page
Questions Presented	i
Statement of the Case	1
Reasons for Not Granting the Petition	6

TABLE OF AUTHORITIES

Cases — Page

Arizona v. Washington, 434 U.S. 497 (1978) 9, 10, 11

Cherry v. Director, State Board of Corrections, 635 F.2d 414 (5th Cir. 1981) 11

Greene v. United States, 355 U.S. 184 (1957) 6, 7

Hudson v. Louisiana, ... U.S. ..., 101 S.Ct. 970 (1981) 12

Lee v. United States, 432 U.S. 23 (1977) 9

Scott v. United States, 202 F.2d 354 (D.C. Cir. 1952) 11

United States v. Beckerman, 516 F.2d 905 (2nd Cir. 1975) 12

United States v. Bobo, 586 F.2d 355 (5th Cir. 1978) 11

United States v. DiFrancesco, ... U.S. ..., 101 S.Ct. 426 (1980) 6, 7, 8

United States v. Dinitz, 424 U.S. 600 (1976) ... 6, 7, 11

United States v. Gentile, 525 F.2d 252 (2nd Cir. 1975) 12

United States v. Gordy, 526 F.2d 631 (5th Cir. 1976) 11

United States v. Grasso, 600 F.2d 342 (2nd Cir. 1979) 12

United States v. Jamison, 505 F.2d 407 (D.C. Cir. 1974) 11, 12

United States v. Jenkins, 420 U.S. 358 (1975) 8

United States v. Jorn, 400 U.S. 470 (1971) 10

United States v. McKoy, 591 F.2d 218 (3rd Cir. 1979) 11

United States v. Phillips, 431 F.2d 949 (3rd Cir. 1970) 11

Page

United States v. Scott, 437 U.S. 82 (1978) 5, 6, 8, 9, 11, 12

United States v. Starling, 571 F.2d 934 (5th Cir. 1978) 11

Constitution

United States Constitution, Fifth Amendment 7

Rule

Rules of the Supreme Court of the United States, Rule 17 6

Statutes

United States Code, Title 26, Sec. 7203 ..... 1, 2

United States Code, Title 26, Sec. 7602 4

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IN THE

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UNITED STATES OF AMERICA,

Petitioner,

vs.

JACK A. DAHLSTRUM,

Respondent.

BRIEF IN OPPOSITION.

Statement of the Case.

Respondent was charged with willfully failing to file personal income tax returns for the years 1973, 1974, and 1975, in violation of 26 U.S.C. 7203. C.R. 1.[1] He filed no pretrial motions, and on April 9, 1980, filed a Trial Memorandum which contained no mention of the I.R.S. summons issued for the production of books and records of the law partnership in which he was a member. C.R. 12, pp. 1-16. On April 10, 1980, the defendant stipulated to the fact that the income reported on the law partnership's returns for the years 1973 through 1975 was corroborated by the books and records of the partnership. C.R. 13, p. 2.

[1] "Tr." refers to the Transcript of the proceedings in the District Court. "C.R." refers to the Clerk's Record in the District Court.

A bench trial commenced on April 14, 1980. After four witnesses had testified, the Government called Ostrove, the attorney who represented the defendant during the I.R.S. investigation. Ostrove testified that he repeatedly had no success in obtaining a response to letters and phone calls made to the special agent, requesting information about civil matters. Ostrove was told by the special agent that "they were not interested in discussing collection or civil matters of any kind." Tr. 119-123, 140, 144-147.

Following Ostrove's testimony, the Court informed the parties that it was disturbed about Governmental impropriety, in that the summons issued to the law partnership for its books and records was issued in a solely criminal investigation. Tr. 191-196. During a colloquy with the Court, the Government offered to put Special Agent Shreiber on the stand in an attempt to "clear the whole thing up." The Court responded that it might ". . . decide whether I should even go on any further with this case, or throw it out on the grounds of I.R.S. misconduct." Tr. 196. It was at this point that the Court first hinted at terminating the proceeding *sua sponte*.

Shreiber testified regarding the circumstances surrounding the issuance of the summons, and the nature of the investigation. During the broad and extensive inquiry, counsel for defendant briefly questioned the witness for the purpose of clearing up the record to reflect that Shreiber never noted the "statute potential" in his reports as a civil fraud penalty, and always referred solely to a criminal violation of Section 7203. Tr. 200-206. The Court directed Shreiber to produce his internal records relating to the investigation, and stated that in going through the files, nothing indicated that there was any civil investigation, and the sole purpose of issuing the summons was to get papers for the criminal investigation. Tr. 206, 240. The Court observed that the

case should be subject to sanctions of some sort, and stated: "The material thing is this: Was there an impropriety here, and if so, is it the kind that the cases suggest warrant dismissal of the case as a warning . . . to I.R.S. to abide by the law . . . I'm not blaming this agent, I'm blaming his superiors . . . ." Tr. 248. In this regard: "What's the solution? Motion to suppress or motion to strike or dismissal of the case? . . . dismissal is the preferred technique if you really want to see action." Tr. 263.

Government counsel then suggested that: ". . . if your Honor were to find that this was not so egregious that there should be a dismissal of the case or suppression of the evidence and instead went forward with the case and found the defendant guilty, then I daresay that that would not be the last that was heard of in this matter." The Court's response was that the evidence so far indicates lack of guilt, ". . . if you take the presumption of innocence together with the burden upon the Government to prove each and every essential element of the crime charged . . . *I haven't found it beyond a reasonable doubt*." Tr. 264, 265.

Group Manager Thomas Sullivan was called to testify by the Court concerning aspects of the investigation, and general I.R.S. practice regarding the issuance of summonses. Sullivan was questioned extensively by the Court, and defense counsel conducted limited inquiry to clarify certain matters relating to the status of the case. Tr. 282-288.

At no time during the proceedings was there any suggestion from defense counsel as to a possible remedy for the institutional impropriety perceived by the Court. No motions were made during the trial by the defendant, either seeking suppression or termination of the trial.

The Court ordered dismissal of the case with prejudice, on the basis: ". . . of the recent testimony here of this

officer, who says it's an institutional practice to issue these summonses under 7602 by a special agent of the Criminal Division . . . at a time when the case has already been referred over from the Collection Division . . .", and stated: ". . . I have invoked the remedy which is most recommended by the *Serubo* case . . . that 'perhaps a dismissal of an indictment is virtually the only effective way to encourage compliance with the ethical standards by prosecutors and by —' I'll add 'investigators'." Tr. 303, 304.

The Court further stated: "Now, I don't think that any case can be made beyond what's been made, so I am going to dismiss it with prejudice, and then it will be up to the Government to do what they wish about it. I think that it's an appropriate dismissal." Tr. 310. "I want to thank you, Mr. Kluger, and ask if you will — I would appreciate it if you'd bring it to the attention of the Assistant Attorney General that I believe this is going to be the way other Courts are going to go on this problem, at least out here." Tr. 315.

At the conclusion of the proceedings, the Court either requested or ordered defense counsel to submit proposed Findings of Fact, Conclusions of Law, and an Order. Tr. 311, 312. When offered an opportunity to object to the proposed findings or order, Government counsel replied that it doesn't matter since: "We can't appeal from your Honor's order . . ." Tr. 313. On July 6, 1980, defense counsel submitted the requested documents to the Court. C.R. 20. On July 10, 1980, the Government filed its objections. C.R. 19. On July 11, 1980, the District Court filed its written decision, which incorporates neither Petitioner's nor Respondent's suggested findings and conclusions. The Court also entered judgment, stating that the indictment was dismissed with prejudice, and Respondent was "acquitted" of the charges contained in the indictment. C.R. 17, 18.

The Court of Appeals found:

A. It need not decide whether the disposition by the trial Court constituted an acquittal; there is some evidence to support the contention that the District Judge's disposition constituted an acquittal; after reviewing the entire record, it could not conclude with any degree of certainty that the District Judge's disposition actually represented a resolution of any of the factual elements of the offense charged; because of the lack of clarity in the record, it did not rest its holding on the District Judge's acquittal.

B. The *Scott* case is based upon defense participation, where the defendant "elected to seek termination", made a "voluntary choice", persuaded the trial Court to dismiss, and retained "primary control of the course to be followed." In this case, the judge was the instigator and primary mover of the events that lead to dismissal of the indictment; the judge took complete control of the proceedings, and set off on a course over which Appellee had no control. The judge did not believe the Government had proved its case, and there is no doubt that Appellee wanted the judge to decide the case in his favor. The Appellee's relatively passive role should not be taken to reflect anything beyond a keen appreciation of the fact that the judge had taken over the proceedings.

C. It was not manifestly necessary to terminate the bench trial prior to a resolution on the merits, which occurred because of the judge's desire to send the I.R.S. a message. The trial judge did not consider available alternatives.

REASONS FOR NOT GRANTING THE PETITION.

1. The issues raised herein do not fall within the character of considerations enumerated in Rule 17 of the Rules of the Supreme Court. This Court has had occasion to consider and pass upon double jeopardy claims in no less than twenty-two cases in the past ten years. *United States v. DiFrancesco*, ____ U.S. ____, 101 S.Ct. 426, 431 (1980). No prior case parallels the factual circumstances presented above. We submit, however, that the facts of this case are so unusual, and the position taken by the trial Court so unique, that the decision below affects few other litigants. That decision is not in conflict with decisions of other federal courts of appeal on the same matter, and is not a departure from prior opinions of this Court.

2. Petitioner's central theme is that when the trial Court raised the possibility of terminating the trial, the defendant was obligated to object to such course of conduct, and demand that the trial proceed to a finding of guilt or innocence. This proposal amounts to urging that the defendant has waived his right to the protections of the Double Jeopardy Clause by his silence. In *United States v. Scott*, 437 U.S. 82, 99 (1978), this Court noted that it was not adopting the doctrine of "waiver" of double jeopardy, which it had earlier rejected in *Greene v. United States*, 355 U.S. 184 (1957). "Rather, we conclude that the double jeopardy clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice." The voluntary choice in *Scott* was reflected in the defendant's motion to dismiss.

The "waiver" argument was earlier rejected in *United States v. Dinitz*, 424 U.S. 600, 609 (1976): ". . . traditional waiver concepts have little relevance where the defendant must determine whether or not to request or consent to a

mistrial in response to judicial or prosecutorial error. (Citations) In such circumstances, the defendant generally does face a 'Hobson's choice' between giving up his first jury and continuing a trial tainted by prejudicial judicial or prosecutorial error. The important consideration, for purposes of the double jeopardy clause, is that the defendant retain primary control over the course to be followed in the event of such error."

Requiring a defendant to object to termination of a trial in circumstances similar to those found in this case would create potential chaos at the trial level. Here, the Court had expressed its belief that the Government had not proved the element of "willfulness" beyond a reasonable doubt. It identified what it perceived to be I.R.S. misconduct in use of its summons' power. It expressed the desire to send a message to the Assistant Attorney General that such conduct would not be condoned in the District. Clearly, suppression would not convey the same message as a dismissal based upon misconduct. Requiring a defendant to mouth objections to the favorable termination of his agony, in the face of a Court's desire to sanction the actions of a significant governmental agency, would cause embarrassment, friction, and confusion, without achieving any beneficial result.

3. This Court recently enumerated in *United States v. DiFrancesco, supra*, the general principles emerging from the Court's earlier double jeopardy decisions, now regarded as essentially settled. The first such principle sets forth the "general design" of the double jeopardy clause of the Fifth Amendment, as enunciated in *Greene v. United States, supra*, where it was stated that the clause was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. The underlying idea ". . . is that the State with all its resources and power should not be allowed to make

repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." 101 S.Ct., at 432. This principle, central to consideration of any issue under the double jeopardy clause, has been totally ignored in the Petition.

Petitioner relies upon language in *United States v. Scott, supra,* without due consideration of the factual setting in that case. The defendant had before trial and twice during trial moved to dismiss counts of the indictment on the ground that his defense had been prejudiced by pre-indictment delay. At the close of all evidence, the Court granted his motion. This Court held that ". . . in a case such as this, the defendant, by *deliberately choosing* to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he is accused, suffers no injury cognizable under the double jeopardy clause if the Government is permitted to appeal from such a ruling of the trial Court in favor of the defendant." 437 U.S., at 98, 99. (Emphasis added).

The importance of *Scott* is that it modified *United States v. Jenkins,* 420 U.S. 358 (1975), finding that *Jenkins* placed an ". . . unwarrantedly great emphasis on the defendant's right to have his guilt decided by the first jury impaneled to try him so as to include those cases where the *defendant himself* seeks to terminate the trial before a verdict on grounds unrelated to factual guilt or innocence." 437 U.S., at 87 (emphasis added). In *DiFrancesco, supra,* the Court likewise stressed the fact that the termination of the trial was at the *request of the defendant* in *Scott.* 101 S.Ct., at 434.

In this case, it is clear that the defendant did not seek to have the trial terminated without a finding of guilt or innocence. He had made no pretrial motion to exclude the fruits of the summons, and had stipulated that the records produced by the summons corroborated the figures on the partnership's income tax return. The summons' issue was raised solely by the Court after the Government had virtually concluded its case. The defendant did not leap upon a rumination of the Court, and initiate the inquiry. The Government called one witness to testify as to the propriety of the summons, and the Court called the other witness testifying on that point. Counsel for the defendant asked a limited number of questions to clarify factual questions raised by the Court. At no point did the defendant suggest any remedy to deal with the impropriety perceived by the Court. The only colloquy dealing with a remedy was between the Court and counsel for the Government. The remedy selected by the Court was clearly for the purpose of conveying a message to the Assistant Attorney General that improper use of the administrative summons in I.R.S. investigations would not be tolerated in his District. No analogy can be drawn between this fact situation and those in which a defendant's course of conduct brings about the early termination of the trial.

4. As long as the termination is not an acquittal, there is no material difference for purposes of the present issue between dismissals and mistrial. *United States v. Scott, supra,* 437 U.S. at 90-94; *Lee v. United States,* 432 U.S. 23, 28-31 (1977).

In *Arizona v. Washington,* 434 U.S. 497 (1978), the Court enumerated the factors to be considered in determining whether the declaration of a mistrial bars further prosecution. "The trial judge, therefore, 'must always temper the decision whether or not to abort the trial by considering

the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate.' (citation) In order to insure that his interest is adequately protected, reviewing courts have an obligation to satisfy themselves that . . . the trial judge exercised 'sound discretion' in declaring a mistrial. Thus, if a trial judge acts irrationally or irresponsibly (citations), his action cannot be condoned." 434 U.S., at 514. It is the burden of the trial judge — not counsel — to assure himself that the situation warrants action on his part foreclosing the defendant from a potentially favorable judgment by the tribunal. *United States v. Jorn*, 400 U.S. 470, 486 (1971).

Petitioner has never urged that the defendant's trial in this case was terminated due to "manifest necessity." If the Judge's actions were unwarranted, they were solely of his own design, and retrial is not permissible.

Petitioner urges that the decision below denies the Government any opportunity to try Respondent for the crimes for which he was indicted. The decisions of this Court clearly hold that such is always the case when a mistrial is granted without manifest necessity, unless the mistrial has been brought about by overt actions of the defendant.

5. Petitioner asserts that the decision in this case is at odds with the decisions of other courts of appeal, by placing undue reliance on the defendant's failure to move for dismissal, and declining to consider his failure to object to the proposed dismissal. Petitioner appears to recognize that the question of whether a defendant has consented to a mistrial is a question of fact, since all courts consider the totality of circumstances in determining this issue. The Court below considered the totality of circumstances, and concluded that the defendant had not sought a termination of the trial on other than guilt related grounds, that the Judge took com-

plete control over the proceedings and set off on a course over which the defendant had no effective control, and that the Appellee's involvement in the termination of the trial was at best minimal. In no way did it reach the high degree of participation that was present in *Scott, supra,*.

Each case relied upon by Petitioner was decided prior to his Court's opinions in *Scott, supra,* and *Dinitz, supra,* holding that the concept of waiver is not applicable to issues arising under the double jeopardy clause, and also prior to this Court's decision in *Arizona v. Washington, supra.*

In addition, virtually every case relied upon by Petitioner has been diluted to a greater or lesser extent by later decisions in the same circuit. *United States v. Gordy,* 526 F.2d 631 (5th Cir. 1976), contains dictum relied upon by Petitioner in a situation in which a mistrial was declared *over objection* when a jury was unable to reach a verdict. See *United States v. Starling,* 571 F.2d 934 (5th Cir. 1978); *United States v. Bobo,* 586 F.2d 355, 364, 365 (5th Cir. 1978); *Cherry v. Director, State Board of Corrections,* 635 F.2d 414 (5th Cir. 1981), which collectively hold that the waiver concept does not apply, that counsel should participate in determining whether the trial should be aborted, and that the Court is required to consider alternatives to early termination.

United States v. Phillips, 431 F.2d 949 (3rd Cir. 1970), likewise involves a jury unable to reach a verdict, where manifest necessity was found. See *United States v. McKoy,* 591 F.2d 218, 222 (3rd Cir. 1979), holding that the trial Court must consider and exhaust all other possibilities before declaring a mistrial.

Scott v. United States, 202 F.2d 354 (D.C. Cir. 1952), was followed by *United States v. Jamison,* 505 F.2d 407,

412, 413 (D.C. Cir. 1974), where the Court rejects the "waiver" concept in the double jeopardy context.

In *United States v. Gentile*, 525 F.2d 252 (2nd Cir. 1975), and *United States v. Beckerman*, 516 F.2d 905 (2nd Cir. 1975), the Courts found that there was actual consent to the mistrial, considering the totality of the circumstances. See *United States v. Grasso*, 600 F.2d 342, 343, fn. 3 (2nd Cir. 1979), where the Court held that a motion to dismiss was not consent to a mistrial.

6. The Court below, in a rather peripatetic fashion, held that it need not decide whether the disposition in the trial Court constituted an acquittal; found there was some evidence to support the contention that the disposition constituted an acquittal; found that the transcript clearly showed that the Judge did not believe the Government had proved its case; but could not conclude with any degree of certainty that the disposition actually represented a resolution of any of the factual elements of the offenses charged. We submit that the trial Court actually resolved the factual element of willfulness in the defendant's favor. That conclusion is best supported in the Order reading: "Defendant is acquitted of and from any and all counts and charges contained in said indictment." The trial Court's characterization of his own action cannot control the classification, however. A defendant is acquitted only when the ruling of the judge, whatever its label, actually represents a resolution in the defendant's favor, correct or not, of some or all of the factual elements of the offense charged. *United States v. Scott, supra*, 437 U.S., at 96.[2]

Prior to the trial Court questioning the propriety of the summons, the Government had called five witnesses to es-

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[2]See also *Hudson v. Louisiana*, ____ U.S. ____, 101 S.Ct. 970 (1981).

tablish its prima facie case, and then asked for a short recess. Tr. 189, 190. Immediately thereafter, the Court first raised the issue of the propriety of the summons. It was well into the discussion regarding the summons when the Court commented: "The evidence so far indicates lack of guilt, if you take the presumption of innocence together with the burden upon the government to prove each and every essential element of the crime charged and if you look at the cases which I point out to you requiring specific intent even in misdemeanor IRS cases . . . I haven't found it beyond a reasonable doubt so far." Government counsel then responded that there were matters already in the record that would indicate willfulness, which would be argued at the appropriate time. Tr. 265. At no time did he claim or imply that there was additional evidence of guilt yet to be produced.

The Court's statement as to insufficiency of evidence of willfulness supports the written Order acquitting the defendant. We submit that the reason that the Court orally dismissed the proceedings at the end of the second day of trial, with prejudice, was that it wished to send a clear message that improper use of IRS summonses would be severely dealt with in his District. We submit that a mere acquittal would not convey the same message as a dismissal for governmental impropriety.

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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